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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DONALD SCHRIVER, INC., SULLIVAN-KELLEY & ASSOCIATES, TOPAZ CONTRACTING & DEVELOPMENT COMPANY, INC., AND SULLIVAN AND ASSOCIATES,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONERS REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI FOR THE DISTRICT OF COLUMBIA CIRCUIT

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I.

UNLESS THE PETITION IS GRANTED SUPREME COURT REVIEW WILL BE FORECLOSED AND CONSTRUCTION UNIONS WILL BE ABLE TO COERCE STRANGER CONTRACTORS TO ACCEPT BROAD SUBCONTRACTING RESTRICTIONS

The Solicitor General agrees with Petitioners that the issues presented--the

scope of the section 8(e) construction industry in the aftermath of Connell Constr. Co. v. Plumbers, Local 100, 421 U. S. 616 (1975) and the relationship between sections 8(e) and 8(f) of the National Labor Relations Act, are "of importance in the application of the National Labor Relations Act to the construction industry ..." (Opp. p. 12). Notwithstanding the government's recognition of the significant impact the decisions below have had upon an industry fundamental to the Nation's economy; the Solicitor General implausibly asserts the review should be denied solely because there are no inconsistent circuit court decisions. The Unions do not claim the issues decided below are insignificant, rather they contend the petition should be dismissed because it "is at best premature" (Opp. pp. 1-2).

In fact, unless the Court accepts this petition, the opportunity for review by the highest authority of these paramount issues will be forever precluded. Since issuance of the Board

decision in this case on November 13, 1978; the Board's General Counsel has been barred by the instant Board precedent from issuing the same section to 8(b)(4)(A) and 8(e) complaints which preceded the instant case. "(The Board's General Counsel), of course, must respect the rules of decision of the Board ...." 93 Cong. Rec. 6859 (1947) (remarks of Sen. Taft). See also Hanna Mining Co. v. Dist. 2 Marine Engrs., 382 U.S. 181, 186 (1965) (§ 8(b)(4) charge dismissed since picketing in conformity with NLRB standards). Section 3(d) of the Act confers upon the General Counsel the sole authority to prosecute allegations of unfair labor practices. The Board then has no jurisdiction sua sponte to reverse the decision below in the future and will not even obtain the opportunity since the General Counsel is precluded from issuing complaints by operation of the decision appealed from here. Since there is apparently no federal court jurisdiction to review the General Counsel's refusals to issue complaints predicated upon Board

precedent[1], the issues here will necessarily escape federal circuit court review. Accordingly, the instant petition is not "premature".

Congress enacted sections 8(e) and (f) in 1959. Since 1959, only one "section 8(e) proviso case" has reached the Court, and in Connell the Court did not definitively define (1) the parameters of a "collective bargaining relationship" between construction companies and craft unions or (2) the legal scope of secondary subcontracting restrictions as applied to current and future jobsites, to employers signatory to contracts with the one union or all craft unions, to jobsites where no members of the signatory union are working, or whether evidence of jobsite friction is necessary to validate concerns over jobsite friction between union and nonunion employers. The instant petition raising questions of coercive attempts to

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[1] Rockford Redi-Mix Co. v. Lubbers, et al, 632 F.2d 30 (7th Cir. 1980), cert. denied, 450 U.S. ___ (No. 80-5903 Feb. 23, 1981); Pacific Southwest Airlines v. NLRB 611 F.2d 1309 (9th Cir. 1980).

obtain restrictive agreements from contractors whose employees the unions have never represented nor attempted to represent presents the last possibility for this Court to address both these issues[2].

Since NLRB v. Jones & Laughlin Steel Corp., 301 U.S.1 (1937), the Court has exercised its certiorari jurisdiction to insure that the Board and the courts respect the balance struck by Congress in the Taft-Hartley Act between labor and

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[2] Certiorari petitions filed on April 29, 1981, in Pacific Northwest Chapter, et al. v. NLRB, (9th Cir. April 17, 1981) (en banc), a case consolidated with the instant case before the NLRB, present separate but equally important questions: whether subcontracting clauses can be sought by coercion and the actual scope of subcontracting restrictions where the union represents the contractor's employees, a question left open in Connell. Acceptance of these petitions as well as the instant petition provides comprehensive resolution upon fully developed factual records of closely interrelated questions.

management. See e.g. American Ship Bldg. v. NLRB, 380 U.S. 300, 316-17 (1965). In 1959, Congress intended to close secondary boycott loopholes and curb construction union "top down" recognition abuses. Connell, supra, 421 U. S. at 633. The instant petition is the first (and last) case in the nearly 22 years since the 1959 enactment of the construction industry proviso presenting for review whether the result reached by the Board below is consistent with the paramount purpose of federal labor policy to grant all employees, including construction industry employees, the public right to "bargain collectively through representatives of their own choosing." Connell, supra, 421 U.S. at 628. The instant petition questions the unfettered right granted craft unions by the Board and the Court of Appeals to coercively limit present and future jobsite work to union members through broad restrictive sub-contracting clauses creating union only jobsites forcing all craft workers to join craft unions or lose employment opportunities regardless of their particular desire for union representation. The decisions below, contrary to the rationale of

Connell, subordinate the section 7 rights of construction industry employees to the self interest of the construction union to obtain all union jobsites without first obtaining designation as the bargaining agent of the affected employees[3] by a limitless "interpretation" of the § 8(e) construction industry proviso[4].

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[3] Here, the Carpenters Local 1497 obtained a voluntary agreement with Schriver in June 1972 but made no attempt at any time to organize Schriver's carpentry employees and Schriver continued to operate as if there never had been such a voluntary signing until the coercion in the instant case.

[4] The Court below construed the proviso to protect coercive demands for such unlimited contracting restrictions in all circumstances where the pressured contractor employs any craft workers or where the contractor, like Topaz, unlike Schriver the co-petitioner, functions as a general contractor without any craft employees but retains the right to accept bids from subcontractors who employ craft workers. There is then no situation in the construction industry where such coercive demands can be resisted under section 8(b)(4)(A) since, under the rationale below all such coercive picketing and threats of picketing are equivalent to the establishment of a "collective bargaining relationship."

Unless the instant petition is accepted, the unprecedented and unsupportable nullification of section 7 rights will be

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(Footnote 4 Concluded)...

This rationalization not only nullifies 8(b)(4)(A) and allows the § 8(e) proviso to swallow the prohibition against admittedly secondary subcontracting restriction in § 8(e), it also nullifies the 1959 Congressional harmonization of sections 8(e) and (f) in the aftermath of Carpenters, Local 1976 v. NLRB (Sand Door), 357 U.S. 93 (1958), that only voluntary 8(e) and 8(f) agreements are permitted. In this respect, the decision below disregards NLRB v. Ironworkers, 434 U.S. 335, 348 n.10 (1978) wherein the Court recognized Congress intended to legalize only uncoerced § 8(f) agreements.

Coercive attempts to obtain 8(f) agreements which include subcontracting restrictions are proscribed by section 8(b)(4)(A) unless sought by a union which is the bargaining representative of the picketed employer's craft workers or is entitled to presumption of majority status either because the contractor actually employs union members or a majority of nonunion members have signed uncoerced bargaining authorization cards.

permanent[5].

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[5] The Solicitor's insistence (Opp. 23-24) that section 8(b)(7) provides the sole remedy because the picketing is arguably recognitional or organizational ignores stipulated facts. The unions here picketed and threatened to picket solely to obtain agreement to subcontracting restrictions. It also ignores that the issue here concerns the legality vel non of subcontracting restrictions under section 8(e). The scope of the § 8(e) proviso cannot be expanded solely by reference to 8(b)(7) because each is "aimed at wholly different problems." Dallas Bldg. Trades Council v. NLRB, 396 F.2d 677, 682 (D.C. Cir. 1968). Deference to the Board is entirely unwarranted where it seeks to justify its "interpretation" of the Act by reference to an irrelevant statutory provision not involved in this case.

II.

CONFLICTING INTERPRETATIONS OF CONNELL BY TWO FEDERAL CIRCUITS REQUIRE RESOLUTION

The Ninth Circuit's en banc opinion in Pacific Northwest Chapter, et al. v. NLRB, ___F.2d ___ (April 17, 1981), petitions for certiorari filed April 28, 1981 is premised upon a radically different interpretation of Connell from that of the District of Columbia Circuit below. This Court's overriding concern to preserve federal labor law restrictions upon "top down" organizing tactics by construction unions is regarded as "entirely inapplicable" by the court below (Pet. App. 30-a) solely because the unions did not affirmatively disclaim a recognition object[6], and

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[6] Contrary to the union's insistence (Opp. p.7), this difference is legally insignificant. The Connell Court's concern was for the top down organizing effects upon construction contractors other than Connell. The precisely identical effect is present in this case.

also surrounded the restrictive clause with other terms and conditions of employment.[7] The Ninth Circuit

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[7] The decisions below fail to distinguish section 8(f) pre-hire contracts from collective bargaining agreements or relationships, contrary to this Court's decision in NLRB v. Ironworkers, supra, recognizing such contracts as "merely preliminary" to a bargaining relationship. 434 U.S. at 345. Earlier the Board's General Counsel had also recognized that pre-hire agreements prior to and after the 1959 section 8(f) and (e) amendments to the Act "are not conventional collective bargaining agreements, nor is a conventional collective bargaining relationship sought, but rather an attempt is made to obtain skeleton agreements (containing little more than subcontracting provisions)" (citing Dallas Bldg. v. NLRB, supra, 396 F.2d at 682). Report on Case Handling at NLRB 1974 Labor Relations Yearbook (BNA) 298, 307.

Now, however, we are told by the Board in the instant cases that Congress in 1959 equated a skeleton agreement to a collective bargaining relationship notwithstanding a prevalent construction industry practice to the contrary. The instant record demonstrates by stipulation that nationwide prior to 1959 these skeleton agreements were present in less than 10% of the industry. The studies cited by the Solicitor are contrary to the record here. (Opp. p.20).

contrary to the Court of Appeals below, necessarily recognized the Connell Court's holding that impermissible "top down" organizing effects are present in any secondary subcontracting restriction. The Ninth Circuit interpreted Connell to permit these prohibited effects only when the union has a pre-existing primary interest in the signatory employer's workers demonstrated by either section 9 representation [8] status or by a presumption of such status:

> "When a union represents employees of a prime contractor and seeks a subcontracting agreement, it has the interests of the employees in its primary bargaining unit at stake to at least some degree." Sl. Op. pp. 22-3.

It is stipulated in the instant case that the unions had no "pre-existing primary" representation interests in Topaz's carpentry employees and in the case of Schriver the earlier pre-hire agreement

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[8] The Ninth Circuit's en banc decision is attached to the Solicitor's April 24, 1981 letter to the Clerk. References herein are to the slip opinion pages of the Court's opinion.

was never given any effect, thus the "top down" organizing impact upon other subcontractors stands alone. These conflicting interpretations of the Court's Connell opinion can only be reconciled by this Court.

The Ninth and District of Columbia Circuits have also adopted three different views of the legal scope of secondary subcontracting restrictions. The District of Columbia Circuit perceives no limitation upon such restrictions. They are enforceable at all present and future jobsites regardless of whether members of the signatory unions will be working at the jobsite and subcontracting restrictions apply to all contractors who have contracts with any craft unions affiliated with the District Council, not just to a particular union. The Ninth Circuit en banc majority limits secondary subcontracting restrictions to contractors having agreements with the same signatory union but applies them to jobsites where members of the signatory union are not working (Sl. Op. 27). The four dissenting

Ninth Circuit judges conclude the Court's phrase "particular job site" (421 U.S. at 635) places outside the section 8(e) construction industry proviso subcontracting restrictions extending to any jobsite where the signatory contractor does not employ union members (dissenting opinion of J. Sneed at p. 1 and of J. Farris at p. 3). These directly conflicting interpretations of Connell also can only be clarified by this Court [9].

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[9] The Ninth Circuit majority "concede that the language of the Connell opinion dealing with congressional antagonism to "top down organizing" may well lean in a direction contrary to our views." Sl. Op. p. 27.

III.

THE UNRESTRICTED FREEDOM GRANTED CONSTRUCTION UNIONS TO COERCIVELY CREATE UNION ONLY JOBSITES THREATENS THE COMPETITIVE BIDDING SYSTEM IN AN IMPORTANT SEGMENT OF THE NATION'S ECONOMY

Although Congress specifically condemned "top down" organizing tactics in the construction industry as inimical to the section 7 right of craft employees, the decisions below stands Congress' purpose on its head by so broadly construing the section 8(e) construction industry proviso as to swallow section 8(b)(4)(A) and by authorizing craft unions to use unrestricted coercion to force contractors to work and bid upon only all union jobsites. Under this erroneous rationale contrary to the decision of the Court, unions can picket general contractors like Connell and Topaz to force them to agree to subcontract jobsite work only to contractors signatory to union contracts. Since general contractors do not perform the work subject to the subcontracting restrictions, the Board in earlier decisions agrees that section 8(b)(7) does not have any application. Sletten Constr. Co., 222 NLRB 176 (1976). Non-union contractors can only become "acceptable" bidders by signing the union contract. These restrictive subcontract agreements and the union's newly created powers to enforce them also force non-signatory construction companies and their employees

off jobsites where craft work is let by competitive bids. Such agreements further preclude unionized contractors from bidding on any work where one contractor might be non-union. The circle is complete and the "top down" organizing effect achieved is identical to the proscribed object of Local 100 in Connell. The open-ended inflationary impact upon an industry where recovery is critical to our economic stability effected solely by a reversal of federal labor policy has such adverse consequences to the general consuming public as to warrant immediate review by this Court. The decisions below legalize coercive conduct to obtain broad subcontracting restrictions in all circumstances unless the pressuring union affirmatively disclaims recognitional interest. Unions would now be able to control the companies with whom a general and a subcontractor may do business under circumstances completely divorced from a collective bargaining relationship. This competitive dislocation within the construction industry is simply not

sanctioned by federal labor policy. There is no forum except this Court where the nation's largest industry can turn for review of the anti-competitive and "top down" organizing consequences resulting from the decisions below.

CONCLUSION

The instant petition is the last opportunity to finally define or clarify a "collective bargaining relationship" in the context of the section 8(e) construction industry proviso and prevent its "top down" imposition upon stranger contractors and their employees. The resolution of the issue has uncontested importance to national labor policy concerning a vital segment of the nation's economy. The petition for certiorari should be granted.

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